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Supreme Court, U.S.
FILED
MAR 20 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 719

COMMERCIAL COMMUNICATIONS, INC., et al.
and
WATSON COMMUNICATIONS SYSTEMS, INC., et al.,
Appellants,
vs.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
and
PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

MOTION TO DISMISS APPEAL.

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Comes now Public Utilities Commission of the State of California, one of appellees above-named, and moves this Court to dismiss for want of jurisdiction the appeal taken herein by appellants above-named upon the ground that the appeal does not present a substantial federal question.

I.

STATEMENT.

The subject matter under discussion is termed private mobile communications service. The word "private" means only that particular facilities are set aside for the exclusive use of a customer, and has no relation to the public utility status of the supplier. It affords direct oral communication with persons in moving vehicles between a fixed radiotelephone instrument and a vehicle equipped with a transmitter, a receiver, a push-to-talk handset or microphone, and an antenna. Communications may be from land stations to vehicles or between vehicles. Because it involves the use of radio, any person desiring to have such a system must apply to the Federal Communications Commission for allocation of a radio wave length and for permission to operate the required equipment. The licensee may purchase, manufacture or lease the equipment from any supplier. He may install, maintain and repair it himself or he may delegate such duties to anyone capable of performing them, but he must remain in control of it and meet the operational requirements of the Federal Communications Commission. The use of such systems is commonplace in the field of law enforcement and in the taxicab business. Appellee The Pacific Telephone and Telegraph Company first engaged in furnishing such systems to licensees of the Federal Communications Commission under lease-maintenance contracts in 1942. At that time it had two such contracts. The demand for the service grew, and appellee Commission in 1954 ordered it to file copies of such contracts with the Commission. A number of other firms were also engaged in lease-maintenance service during the same period.

On January 24, 1956, in the case of *United States of America v. Western Electric Company, Inc., and American Telephone and Telegraph Co.* (Civil Action No. 17-49, U.S.D.C., N.J.) which was a proceeding under the Sherman Act, a consent decree was issued. This provided that American Telephone and Telegraph Company was enjoined and restrained from engaging, either directly or through its subsidiaries (of which appellee Pacific is one) in any business other than the furnishing of common carrier communications services, except that the injunction should not apply, for a specified period, to the leasing and maintaining of facilities for private communications, the charges for which are not subject to public regulation, to persons who were then lessees. The phrase "the charges for which are not subject to public regulation" has been interpreted by the Department of Justice to mean that charges for private mobile service are not subject to public regulation. The other parties to the consent decree interpreted the phrase to mean that if the charges are regulated by a state commission the telephone companies are not prohibited by the decree from furnishing the necessary equipment and facilities. The Federal Communications Commission has not yet taken a stand on the matter.

Within a few weeks after the consent decree, appellee Pacific filed with the Commission the proposed tariff Schedule No. 108-T, which is part of the record certified to this Court. In so doing, it dedicated itself as a public utility thenceforth to provide for the public generally the common carrier communications service not prohibited by the consent decree—the service of installing, leasing and maintaining private communications systems wholly within the State of California, at the rates and charges and in

accordance with the rules set forth in the tariff. At that time, Pacific had 214 contract customers, covering 1702 private mobile units, and had 225 inquiries on hand for private systems. The 214 contracts represented but 4.5% of the total private mobile base stations then licensed in this State.

Appellants and others urged the suspension of the tariff. Public hearings were held; the decision of the Commission was rendered (*Pac. Tel. & Tel. Co.,* 55 Cal.PUC 387) lifting the suspension of the tariff upon certain conditions, among them the increasing of certain of the tariff rates to a compensatory level and the ordering of Pacific to augment its accounting records by keeping separate memoranda that would permit it to develop the complete cost of the service.

Petitions for rehearing were filed and denied; petitions for writ of review were filed and granted by the Supreme Court of the State of California. Thereafter said Court affirmed the Commission's decision. (*Commercial Communications, Inc., et al. v. PUC,* 50 Cal. 2d 512; 327 P. 2d 513; App. A.Juris.St. pp. A1-13.)

II.

QUESTIONS PRESENTED.

Appellants' statement of the questions presented on page 4 of their Jurisdictional Statement is very wide of the mark. The first "question"

> "(1) Whether a state agency can exempt a corporation from the prohibitions of a judicial decree of the United States enforcing the federal antitrust laws;"

assumes that there is such a judicial decree which is applicable to the decision appealed from, when in truth and in fact there is none.

The second "question"

> "(2) Whether the Communications Act's paramount federal policy of fostering competition in the development of radio over the public airways does not preclude individual states from imposing utility regulation on the private radio business;"

ignores the plain language of 47 USCA 152(b). This reserves to the states just such jurisdiction over intrastate communication service by wire or radio as was exercised by appellee Public Utilities Commission of the State of California. There can be no "paramount federal policy" in an area in which the Congress has expressly withheld jurisdiction from its federal agency.

The third "question"

> "(3) Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment are not infringed by state utility controls sought by a telephone monopoly to take over markets served by numerous independent competitors."

presents a paradox. The appellants who are not and do not seek to come within "state utility controls" ask the Court to determine that they have been deprived of due process and equal protection because another has so conducted its business as to subject itself to such controls.

The only question properly before this Court is *whether the appeal presents a substantial federal question.*

III.

ARGUMENT.

1. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants state on pages 2-3 of their Jurisdictional Statement, "The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2)." That section provides that final judgments or decrees rendered by the highest court of a state may be reviewed by the Supreme Court

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

It is worthy of note that appellants have not seen fit to comply with this Court's Rule 15(b)(v) requiring that when the validity of a state statute is involved, its text shall be set out verbatim.

The decision of appellee Commission (55 Cal.PUC 387 (1957)) determined the nature of the service offered by Pacific to be that of a common carrier communication service and also authorized rates therefor. Although rate-fixing may be legislative in nature the matter of rates was not before the California Supreme Court, nor is it before this Court. The jurisdictional aspect of the decision of appellee Commission is not, in legal effect, a statute within the meaning of 28 USCA 1257(2), but even if it were, it does not come within the purview of that statute.

Obviously it is not repugnant to any treaty. Two considerations only remain.

1. Is the decision repugnant to any law of the United States?

2. Is the decision repugnant to the Constitution of the United States?

Appellee Commission respectfully submits that the answer to both questions is in the negative, and that the appeal does not lie.

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2. THE DECISION IS NOT REPUGNANT TO ANY LAW OF THE UNITED STATES.

On page 3 of its Jurisdictional Statement, appellants list the statutory provisions of federal laws which they claim are involved. These are excerpted on pages A-23 and 24 of Appendix B of the Jurisdictional Statement. Even the most cursory glance at those sections discloses that they do not apply to the instant proceeding.

47 USCA Section 152(b) clearly states that the Federal Communications Commission has no jurisdiction with respect to the charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier such as is here involved, subject to the provisions of Section 301 of said chapter. Section 153 defines interstate communications, which are not involved here. Section 301 affirms the control of the United States over all channels of interstate and foreign radio transmission, which is not here involved, and over intrastate transmission when the effects of such use extend beyond the borders of the state, or when use within a state causes

interference beyond its borders. Appellants do not assert, nor does the record show, nor is it a fact, that the effects of the California intrastate radio transmission service in the case at bar extend beyond the borders of California, nor that interference arising from its use in California has occurred beyond its borders.

Section 313 applies only to unlawful restraints and monopolies and combinations in restraint of trade in the manufacture, sale and trade of radio apparatus and devices entering into interstate or foreign commerce and communications.

Appellants advert (p. 4, Juris. St.) to the consent decree entered by the United States District Court for the District of New Jersey on January 24, 1956. While appellants do not claim that the consent decree is a law of the United States within the meaning of 28 USCA 1257(2), so as to confer jurisdiction on this Court, they urge that appellee Commission by the decision here appealed from exempted appellee Pacific Telephone & Telegraph Company from its prohibitions "enforcing the federal antitrust laws." (Idem.)

Pacific is a party to the consent decree and is bound by its terms, if such terms are applicable here. However, the rendering of the common carrier communications service to which Pacific has dedicated itself is not prohibited by the consent decree. As set forth in the Statement herein (p. 2) there is a dispute over the meaning of the effect of the expression which prohibits Pacific and other American Telephone & Telegraph Company subsidiaries from leasing and maintaining facilities for private communications systems, the charges for which are

not subject to public regulation. Appellee Commission found (55 Cal.PUC 387, 399):

> ". . . and the Consent Decree seems specifically to assume that such activities as the one here in contemplation can be rendered by applicant without any injurious effect on the public welfare, so long as such activities are regulated by state commissions. We believe that, if this is the implication of the Consent Decree, it is a fully justified position."

In its majority opinion the California Supreme Court commented (Juris.St.Appen.A pA-13) that the Federal Communications Commission had made no actual determination of the question. The dissenting opinion (pA-21) termed the provision "not a clear declaration", and said:

> "In the circumstances it does not appear that the provision of the consent decree should influence the decision herein."

As appears in footnote 6 (p. 8, Juris. St.) the Federal Communications Commission had not, as of January 8, 1959, assumed any position concerning the effects of the Consent Decree if the lease-maintenance service is found by any jurisdiction to be the furnishing of common carrier communications services and the charges therefor subject to public regulation.

A. The Decision Appealed From Does Not Violate the Sherman Act.

The applicable law in that respect is found in 15 USCA 1, which in part provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce *among the several States,* or with *foreign*

nations, is declared to be illegal: * * *." (Emphasis supplied.)

The proceeding before the Commission did not involve trade or commerce among the several states or with foreign nations. Neither did it involve a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." It involved only the determination that The Pacific Telephone & Telegraph Company had dedicated a particular type of common carrier communications service to the use of the public, and the reasonableness of the filed tariff rates therefor—a determination within the exercise of the jurisdiction of appellee Commission as an agency of the sovereign State of California, and within the area of the powers and duties reserved to the State by 47 USCA 152(b).

Appellants have cited several decisions in support of their contention that the decision appealed from violates the Sherman Act. These would be excellent authority, if applicable.

The case of *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 87 L. ed. 165, has nothing in common with the case at bar.

A license contract provided that on sales of licensed transformers in *interstate* commerce, petitioner should conform to prices fixed by respondent.

On page 168 of the Lawyers' edition we find:

> "Agreements fixing the competitive sales price of articles moving *interstate*, not within the protection of a patent, are unlawful *because prohibited by the Sherman Act.*" (Emphasis supplied.)

The case of *Northern Securities Co. v. U.S.*, 193 U.S. 197, 48 L. ed. 679, was an appeal from a decree enforcing the provisions of the antitrust act against combinations in restraint of *interstate or foreign commerce.* Again, we can discern no application to the facts presently before this Court.

The case of *Parker v. Brown*, 317 U.S. 341, 87 L. ed. 315, cited by appellants, can offer them but cold comfort.

There, the appellee, a producer and packer of raisins in California, sought to enjoin those charged with the administration of the state's Prorate Act from enforcing against appellee a program for marketing a crop of raisins. Appellee alleged that the marketing program was an illegal interference with and an undue burden upon interstate commerce and a violation of the Sherman Act. The great bulk of the raisins produced were ultimately to be shipped in interstate or foreign commerce.

On page 325 of the Lawyers' Edition this Court held:

> "We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. (Citing cases.)
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> • • • • • • •
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> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's

control over its officers and agents is not lightly to be attributed to Congress. (p. 326)

* * * * * * *

"*The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.*" (Emphasis supplied) (p. 327)

This Court reversed the decree granting injunction.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 95 L. ed. 1035, involved the effect of a state statute upon an *interstate* marketing agreement to sell products at a fixed price. While such an agreement, purporting to restrain trade or commerce *among the several states*, would have been unlawful under the Sherman Act, the Court was concerned with the effect of the Miller-Tydings amendment. That amendment expressed, within limits, congressional approval of state fair trade acts. Thus, said the Court on page 1045 of the Lawyers' Edition:

"If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if state law permits. . . . They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion.

* * * * * * * *

"It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibi-

> tions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. (Citing cases.)"

In the instant proceeding, the Sherman Act is inapplicable because no interstate or foreign commerce is involved, and neither, of course, is the Miller-Tydings Amendment. Nor is there a conspiracy or combination in restraint of trade, or the requirement by appellee Commission of any conduct which any federal law prohibits. If appellants have cited this case because of any fancied analogy they think it might bear to the instant proceeding, though factually so at variance, it may be well also to point out that appellee Commission did not, by the decision from which appeal is sought, compel anyone to follow any parallel price policy, nor attempt to regulate appellants in any manner whatever. Like the other cases cited by appellants, the *Schwegmann* case is inapplicable here.

B. The Decision Appealed From Does Not Conflict With the Communications Act.

Appellants urge that the decision of appellee Commission from which this appeal is sought conflicts with "the paramount federal policy" of the Communications Act. Appellee Commission respectfully submits that the most searching scrutiny reveals no conflict. On the contrary, the Communications Act, while setting forth in scrupulous detail the powers and duties of the Federal Communica-

tions Commission, specifically reserves to the states jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ." (47 USCA 152(b))

The only reservation in 152(b) to the jurisdiction of the states is contained in Sec. 301. There we find that the purpose of the chapter is to maintain the control of the United States over all the channels of *interstate or foreign radio transmission.* Purely intrastate transmission of energy or communications or signals by radio must be licensed by the Federal Communications Commission when its effects extend beyond the borders of the state, or when interference is caused thereby beyond the borders of the state. No such condition prevails here.

Section 313 makes the antitrust laws relative to "unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" applicable to the manufacture and sale of and trading in radio apparatus and devices entering into or affecting interstate or foreign commerce and radio communications. The decision appealed from is not an unlawful restraint or monopoly or combination, contract or agreement in restraint of trade. *(Parker v. Brown, supra.)* Neither has it to do with manufacture, trading in or sale of radio apparatus or devices, nor does it enter into the field of or affect interstate or foreign commerce or radio communication.

Section 602(d), Communications Act of 1934, cited by appellants on page 13 of their Jurisdictional Statement,

merely confers authority on the Federal Communications Commission to enforce compliance of laws against restraints and monopolies where applicable to common carriers engaged in wire or radio communication or radio transmission of energy.

Appellants allege (p. 13, Juris. St.) that the approval of the California Supreme Court sanctioned Pacific's voluntary tariff for the leasing and maintenance of radio equipment "despite the prohibitions of the antitrust laws on monopolistic tying arrangements", and cite, in a footnote, the case of *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4, 2 L. ed. 2d 545. In that case, the railroad had sold and leased lands with a "preferential routing" clause which compelled grantees to ship over its railroad all commodities produced on the land, provided that the rates were equal to those of competing carriers. The applicability of the Sherman Act is clear in that case, since we find the following on page 548 of Lawyers' Edition:

> "Since many of the goods produced on the lands subject to these 'preferential routing' provisions are shipped from one State to another the actual and potential amount of interstate commerce affected is substantial."

It is further applicable in that case, as it is not here, because there actually were agreements which the Court found to be in restraint of commerce among the several states. In the instant proceeding interstate commerce is not involved. The subject matter is the recognition by appellee Commission of the public utility status of appellee Pacific in furnishing private mobile communications

service, and the filing of compensatory tariff rates therefor.

Nor is there any "tying arrangement" involved. The Court defines such an arrangement "as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." (p. 550 of Lawyers' Edition.)

Pacific's Cal. Public Utilities Commission Tariff No. 108-T, (part of record on appeal) the tariff which appellants charge was sanctioned by the California Supreme Court despite "monopolistic tying arrangements", (p. 13, Juris. St.) *does not contain any tying arrangements.* On 1st Revised Sheet 4 and Original Sheets 5 and 6, the Court will note that all land station equipment is separately priced, item by item. The furnishing of one is not made conditional upon the purchase or lease of another. The same is true of mobile station equipment (1st Revised Sheet 7) and supplemental equipment (Original Sheet 8). The conditions of service (Original Sheet 13) provide that private mobile services will be furnished on a lease and maintenance basis to those licensed by the Federal Communications Commission. In an emergency or if Pacific after notice fails to provide necessary maintenance, the station licensee may make repairs or procure maintenance from another source during such emergency or failure. In cases involving unusual circumstances, the station licensee himself may be required to install and maintain portions of the facilities.

There is no condition that a station licensee must not purchase from or deal with any other supplier.

Neither is appellee Commission convinced that those who deal with Pacific would have their licenses set aside by the Federal Communications Commission "for being based on contracts that violate the federal anti-trust laws as well as the federal anti-trust decree. Cf. *Connecticut Water Co.*, 25 F.C.C. 1367, 1379 (1958)." (p. 14, Juris. St.)

As has already been asserted herein, the federal anti-trust laws are not applicable. Appellee Commission found, and the California Supreme Court affirmed, that the consent decree was inapplicable to the situation at bar because Pacific's dedication is that of a common carrier communications service not prohibited by the consent decree Pacific's charges are subject to the regulation of appellee Commission. The *Connecticut* case turns on the question of whether Southern New England Telephone Company which furnished the private mobile service was or was not a subsidiary of the American Telephone & Telegraph Company within the meaning of the consent decree. Although the decision mentions that the telephone company furnishes common carrier communications services, apparently they were not involved, since they would have come within the exception in the consent decree. The regulation or non-regulation by the state of charges for the service was not once mentioned in the decision. For all that the case discloses, the service was not a public utility service and the charges therefor were not subject to regulation. Certainly that case is no authority for the contention on page 8 of the Jurisdictional Statement that the California Supreme Court in its decision quoted from a "now rescinded" dictum by the Federal Communications Commission. On the contrary, it appears from ap-

pellants' footnote 10, (p. 8 Juris. St.) that that Commission had not, as of January 8, 1959, assumed any position on the effects of the consent decree when the service is found, as here, to be common carrier communications service subject to state regulation.

The case of *Benanti v. U.S.*, 355 U.S. 96, 2 L. ed. 2d 126 is cited by appellants in support of their assertion that the Communications Act provides plenary and paramount policy in the field of communications, superseding all but the powers of the states. Appellee Commission agrees with the premise, but cannot discern any application of the cited case or of the premise to the decision appealed from.

In the *Benanti* case, a state authorized a wire tap to intercept a telephone message subsequently introduced in evidence in a federal court in a prosecution involving a narcotics law violation. Section 605 of the Communications Act expressly prohibits the use in evidence of a message so intercepted. This Court held (pp. 132-133 of the Lawyers' Edition) that prohibition applicable to both interstate and intrastate communications.

> ". . . Congress did not intend to place the protections so plainly guaranteed in §605 in such a vulnerable position. Respondent points to portions of the Act which place some limited authority in the States over the field of interstate [sic] communication. The character of these matters, dealing with aspects of the regulation of utility service to the public, is technical in nature in contrast to the broader policy considerations motivating §605. Moreover, the very existence of these grants of authority to the States underscores the conclusion that had Congress intended to

allow the States to make exceptions to §605, it would have said so."

In footnote 16 on page 133 of the Lawyers' Edition, the Court points to 47 USC (Supp. II) §152(b), as the reservation to the states of the power, "technical in nature", to regulate "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier." In exercising its clearly reserved powers, the Commission has not contradicted any prohibition of the Federal Communications Act, as was the situation in the *Benanti* case, nor any policy enunciated in that or any other section of the Act. On the contrary, it operated within the jurisdiction reserved to it by the specific statutory provisions of Section 152(b). While Congress might constitutionally subtract even this jurisdiction from the states' authority, it has not done so. To assert that there is an unexpressed purpose to nullify a state's control within the area expressly reserved to the state would indeed make of the law, in the words of the immortal Mr. Bumble, "a ass, a idiot".

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3. THE DECISION COMPLAINED OF IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Appellants are not subject to regulation by appellee Commission because, unlike appellee Pacific, they can and do pick and choose their customers. It is difficult—indeed, impossible—to conceive how they have been denied either due process of the laws or their equal protection, or how they have been injured by the Commission's decision, nor

does the Jurisdictional Statement point to any particulars in this respect. Instead of presenting a real, substantial controversy, appellants conjure up bogies from the future clothed with such protoplasmic language as "taking over", "jeopardizing economic survival" or "permitting a monopoly to prey on its independent competitors." (Juris. St. p. 19.) No suggestion is advanced as to how this may be accomplished, nor are there any particulars given in the statement in the cited article on page 19 of the Jurisdictional Statement that Pacific is protected by the state against destructive competition. and that it is now in a position to preempt the field of lease-maintenance of radio equipment to individual users for private purposes. There is nothing in the record before this Court to justify appellants' fears, and the Commission found that they were not well founded. (55 Cal. PUC 387, 398.)

The California Supreme Court affirmed the Commission's decision in this respect in the following language:

> "Until the commission attempts regulation of these petitioners [appellants], they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. (Citing cases.)" (p. A9, Append. Juris. St.)

Properly speaking, this is the mere assertion of a claim in respect of some constitutional right which this Court found insufficient to raise a federal question in *U.S. Fidelity & Guaranty Co. v. Oklahoma,* 250 U.S. 111, 63 L. ed. 876.

Appellants undoubtedly confuse public utility status with monopoly. Appellants seek to preserve competition

by barring a competitor; they ignore the fact that regulation precludes Pacific from entering into price competition with its competitors and from underbidding them, and compels Pacific to serve those whom its competitors may not elect to serve. While a regulated monopoly is not absolutely invulnerable to the antitrust statutes, as a general proposition, public regulation removes the curse of illegality from such a monopoly. A regulated monopoly is perfectly consistent with the public interest. However, there is no monopoly here, either regulated or unregulated.

There is no known law which prohibits a person from providing the same service a public utility provides, the only limitation being that he must avoid placing himself in the status of one who has dedicated. Neither party has any legal complaint on grounds of competition from the other. This principle is as true in the telephone field as in any other; there is no law which prohibits a man from providing standard telephone service provided he does so on a selective basis falling short of a general dedication. Non-utility telephone systems do in fact exist though obviously they cannot be as comprehensive as Pacific's general system without crossing into the field of dedication.

Appellants' confusion may stem from the fact that as between two or more services *both or all* of which admittedly are public utility, the public interest frequently dictates authorization for only one service in a given area, usually in order that uneconomic duplication of facilities may be avoided. This is particularly true in the general telephone field where it would not only be uneconomical

but inconvenient if a telephone user had to subscribe to several telephone services, each providing its own hand instrument, in order to be sure of reaching anyone whom he might desire to call.

The problem of uneconomic duplication does not exist in the field of private mobile radio service for, even if there were a number of competing utilities offering the service, it would be up to the subscriber to choose, and he would have no need to subscribe to more than one because the service of any one would be complete in itself.

On this "monopoly" aspect, the analogy of private mobile service to the trucking field is pertinent. In California, public utility highway common carriers and non-public utility highway contract carriers exist side by side in large numbers and frequently compete with each other strenuously.

Appellants find it odd that public utility status in the action before appellee Commission was "confined *solely* to the Pacific Telephone and Telegraph Company. (p. 18, Juris. St.) It would be even more odd if such status had been "extended to the numerous other enterprises, such as appellants, which carry on the identical business and compete for the same customers, often with identical equipment that is leased by the Telephone Company to private users" (idem) since their status was not before the Commission and since they have not assumed the obligations of a public utility.

The Commission did, as appellants state in footnote 20 (p. 19, Juris. St.) place "great store" in Pacific's dedication to the public of its property and service. Without

such dedication to serve all who require private mobile communications service at a specified tariff rate, Pacific could not have been considered to be offering a public utility service.

It is not incumbent on appellee Commission to allay appellants' vague and formless fears, but the inference that the Commission's regulation, which discriminates against no one, is "imposed for the sake of private monopoly rather than the protection of the public" (p. 20, Juris. St.) cannot be allowed to remain unchallenged. The public interest is and has been the paramount concern of appellee Commission. The record before this Court discloses [Rep. Tr. p. 172] that Pacific obtains the equipment used in the private mobile communications service largely from suppliers outside of the Bell System. It buys on the open market from the same sources which supply its competitors.

In California, at least, Pacific is required to and does keep separate records of its costs of providing the service here in question and to charge compensatory rates therefor in order that its telephone customers may not be put in the position of subsidizing the private mobile communications service. It is expressly precluded from discrimination in the matter of interconnection of private mobile equipment with its general exchange and toll switching system as between its own private mobile customers and those of its competitors. (55 Cal. PUC 387, 401-5)

The Jurisdictional Statement fails utterly to show wherein any constitutional right of appellants has been violated, because there has been no violation.

CONCLUSION.

Appellee Commission respectfully submits that this Court should dismiss appellants' appeal from the decision of the Supreme Court of the State of California, affirming the decision of this Commission, for the reason that it presents no substantial federal question.

Dated, San Francisco, California,
March 16, 1959.

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